IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL MISCELLANEOUS APPLICATION(BAIL) NO. 322 OF 2006

Mr. Floyd Lopes,
son of Pascoal Lopes,
aged about 38, married,
Restaurant Owner,
R/o H. No.1962, Cobra
Vaddo, Calangute,
Bardez, Goa, presently
in Judicial Custody,
Panaji, Goa. ... Applicant

versus

The Union of India,
Through Shri D. V. D'Souza,
Superintendent of Customs,
Customs House,
Panaji, Goa. ... Respondent

Mr. Mike Mehta, Advocate for the Applicant.

Mr. J. Vaz, Special Public Prosecutor for the Respondent.

CORAM : N. A. BRITTO, J.

DATE : 28TH SEPTEMBER, 2006.

ORAL JUDGMENT

The applicant herein is an accused who along with

another accused by name Glen Rodrigues is being prosecuted before the N.D.P.S. Court at Mapusa, upon a complaint filed by the complainant(respondent herein) under Section 20(b)(c) r/w Section 29 of the N.D.P.S. Act, 1985.

2. The applicant had approached the learned Special Judge, N.D.P.S. Court with his application for bail and the same was rejected by Order dated 21-6-2006. It appears that the applicant along with the said other accused was arrested on 25-4-2006 and on 28-4-2006 the applicant filed an application before the N.D.P.S. Court, purporting it to be an application under Section 91 of the Code of Criminal Procedure, 1973 and the same came to be rejected by Order dated 15-5-2006. In the said application dated 28-4-2006, the applicant pleaded his apprehension that the respondent was fabricating some case against him and with a view to make an effective representation, a direction be issued to the respondent to give the applicant all documents permitted in law in order to enable the applicant to make an application for his release on bail. The said application was objected to on behalf of the complainant stating that the investigation was at preliminary stage and the applicant was not

entitled to any documents and that he would be entitled for all the documents after the complaint was filed before the said Court. As already stated the said application of the accused dated 28-4-2006 came to be rejected by the learned Special Judge on the principle laid down by the Apex Court in **State of Orissa** v. **Debendra Nath Padhi**(2005(1) SCC 568) further observing that no request of the accused could be allowed for production of documents at that stage.

3. The learned Special Judge has rejected the application for bail filed on behalf of the accused observing that the quantity allegedly recovered from the accused Glen Rodrigues is a commercial quantity. At this stage, it may be noted that as per the complainant it is the present applicant who had supplied the said quantity to the said accused Glen Rodrigues and the applicant was arrested at a time when the applicant came to collect the money from the said accused Glen Rodrigues. The learned Special Judge further observed that the prosecution had collected sufficient material to show that such drug was supplied by the present applicant. Therefore, the involvement of the

applicant was substantially established at this stage and in view of the mandate of Section 37 of the N.D.P.S. Act the applicant was not entitled to be released on bail since the quantity found with the said accused Glen Rodrigues was commercial quantity.

4. Mr. Mike Mehta, the learned Counsel on behalf of the applicant in support of the application has submitted that the applicant herein was not found in possession of the said commercial quantity and on the other hand, it is the said other accused who was found with the same. Mr. Mehta has further submitted that he was not informed with the grounds of arrest and when the applicant made an application for getting certain documents, the complainant opposed the same on the ground that the applicant was not entitled to the same and this shows that the documents were prepared subsequently with a view to falsely implicate the applicant in the said offence/s. The learned Counsel Mr. Mehta further submits that Section 67 of the Act is meant for the purpose of further investigations and although a statement of the applicant herein was recorded under Section 67 of the Act, the complainant has not been able to establish the

source from which the applicant secured the said drug before it was supplied to the said accused Glen Rodrigues. Mr. Mehta has also referred to another document supplied to the accused as regards the custody of the seal used by the complainant and submitted that the said seal was taken out only on 26-4-2006 and therefore could not have been used for sealing of the seized drug on 25-4-2006 and that all these circumstances show that the case of the complainant as against the applicant is fabricated and it is probable that it is a false case. The learned Counsel Mr. Mehta has also brought to my notice that there is ample space left upon the conclusion of the panchanama and taking the signatures of the panch witness and that again shows that the panchanama could be fabricated. Mr. Mehta has also submitted that apart from the statements recorded under Section 67 of the said Act there is no other evidence against the applicant and the complainant has not been able to gather any evidence to corroborate the said statement from independent sources. A number of judgments have been cited on behalf of the applicant.

5. On the other hand, Mr. J. Vaz, the learned Special

Public Prosecutor on behalf of the complainant has submitted that the complainant in his affidavit in reply has explained that the date 26-4-2006 was put by mistake and the same ought to be read as 25-4-2006. Mr. Vaz has further submitted that the seal used otherwise remains in the custody of the complainant i.e. the Superintendent of Customs and on 25-4-2006 it was given to the Preventive Officer Shri Rauto to be used in connection with the said raid. Mr. Vaz has further submitted that, by referring to other documents, particularly the warehouse register and the godown receipt, that in case the seal was handed over to the said Preventive Officer Shri Rauto by the complainant on 26-4-2006, the seized article could not have been deposited in the warehouse on 26-4-2006 at 10.00 a.m. as shown on the said warehouse register and on the said receipt. The learned Special Public Prosecutor Mr. Vaz further submitted that only because the source from which the applicant obtained the said drug was not disclosed, it could not entitle the applicant to bail. Mr. Vaz has also submitted that notice of arrest was given to the applicant on 26-4-2005 and the same has been duly signed by the applicant. It is also submitted that after the arrest, summons were served upon the applicant for the purpose of recording his

statement under Section 67 of the Act and therefore the applicant could not complain that the grounds of arrest were not known to him. Mr. Vaz has submitted that the copy of the panchanama was furnished to the accused and their signatures were obtained, as mentioned in para 34 of the complaint filed against both the accused by the complainant on 24-7-2006.

6. There is no dispute that the evidence against the applicant is by way of the statements made by both the accused including the applicant to the complainant, which statements were subsequently recorded under Section 67 of the Act. In this context, on behalf of the applicant, reliance has been placed on two judgments of this Court in the case of **Sardar Mohammed Wali Mohammed** v. **Shri P. S. Namboodri and another**(2004 ALL MR(Cri) 1068) and **Shri B. B. Hugar** v. **Shri Naushad Hasan Pathan and another**(2005 ALL MR(Cri) 1242). In the first case, it was stated by this Court that statements under Section 67 of the Act are to be recorded for the purpose of gathering information as to how the offences took place and it was not for the purpose of couching confession in it. In the

second case, the learned Division Bench doubted the correctness of what was recorded in the said statements under Section 67 of the Act for they were recorded after two and a half months from the date of the incident and therefore the learned Division Bench held that such confessional statement under Section 67 of the Act required supportive corroboration. It has been now held by the Apex Court that confessional statements can be the basis of conviction(See **M. Prabhulal** v. **Assistant Director, Directorate of Revenue Intelligence**(AIR 2003 SC 4311).

7. Section 37 of the Act has made certain offences non bailable and Clause (b) of sub-section(1) of Section 37 provides that no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27-A and also for offences involving commercial quantity(which is the case at hand) shall be released on bail or on his own bond unless -

(i) the Public Prosecutor has been given an opportunity to oppose the application for such a release; and

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he has not been guilty of such offence and that he

is not likely to commit any offence while on bail. Sub-Section(2) of Section 37 provides that the limitations on granting of bail specified in Clause (b) of sub-section(1) are in addition to the limitations under the Code of Criminal Procedure, 1973(2 of 1974) or any other law for the time being in force on granting bail.

8. Contending that there is no prohibition in granting bail to an accused under Section 37 of the Act, Mr. Mehta has placed reliance on a judgment dated 16-5-2005 of the Delhi High Court in **Ms. Pushpa Rani** v. **Narcotic Control Bureau** wherein the Delhi High Court observed as follows:-

> "It is quite clear that to check the menace of dangerous drugs floating in the market, Parliament had provided that the person accused of an offence under the N.D.P.S. Act should not be released on bail during trial unless mandatory conditions provided under Section 37 of the Act are complied with. This is what has been held by the Supreme Court in the decision cited herein above in para 8 thereof. It is clearly implies that unless the mandatory conditions are

> satisfied, where the bar of Section 37 is attracted, the accused should not be released on bail. This, however, does not mean that the accused cannot be released on bail under any situation. If the mandatory conditions are satisfied then the Court can release a person on bail under the N.D.P.S. Act".

9. There cannot be a quarrel with the above proposition of law. However, whenever an application is moved for bail by an accused who is stated to have been found with commercial quantity of charas, the Court is required to adopt a negative attitude towards bail but it can turn positive firstly, if it is satisfied that there are reasonable grounds for believing that the accused is not guilty of such offence under the Act and secondly, he is not likely to commit any offence while on bail and unless these twin conditions are satisfied there can be no question of granting bail. Section 37 of the Act starts with a non obstante clause and unless the mandatory conditions of sub-clauses (i) and (ii) of Clause (b) of sub-section(1) are satisfied there is no question of grant of bail and that is precisely because the N.D.P.S. Act is a special enactment enacted to make stringent provisions for control and regulation of operation relating to

Narcotic Drugs and Psychotropic Substances. The said limitations imposed are in addition to the limitations on granting of bail found in the Code of Criminal Procedure, 1973. The Apex Court in the case of **Superintendent, Narcotics Central Bureau, Chennai** v. **R. Paulsamy**(2001 Cri. L.J. 117) has observed that compliance of Sections 52 and 57 of the Act is a matter which could be established only at the trial and could not be prejudged at the stage of consideration for bail. The minimum which the lower Court should have taken into account was the factual presumption in law that official acts have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the Court during bail stage regarding the compliance of the formalities mentioned in those two Sections. The Supreme Court also observed that recording the finding in terms of Section 37 of the Act is a sine qua non for granting bail to an accused involved in the offence under the Act.

10. The Apex Court in the case of **Collector of Customs, New Delhi** v. **Ahmadalieva Nodira** ((2004) 3 SCC 549) referring to the expression "reasonable grounds" in sub-clause(ii) of

Clause (b) of sub-section(1) of Section 37 observed that the said expression means something more than prima facie grounds. It contemplates substantial probable causes for believing that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision requires existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. In the case at hand, it is not the case of the applicant that any of the provisions of the Act whether directory or mandatory have been violated by the complainant. There is sufficient explanation given as regards the date of removal of the seal from the custody of the complainant when it was handed over to the Preventive Officer Shri Rauto. The other issues raised on behalf of the applicant and which have been referred to herein above at the most can pertain to the realm of appreciation of evidence which can be done only at the trial. There is no doubt that the complainant ought to have stated in the reply dated 6-5-2006 what were the documents which were already furnished to the applicant during the time of investigations and only because no such mention was made it does not mean that the said documents furnished to the applicant and on which the signature

of the applicant was taken were subsequently prepared prior to the filing of the complaint. As stated by the Apex Court in **Superintendent, Narcotics Central Bureau, Chennai** v. **R. Paulsamy**(supra) the Court is required to presume at this stage

that official acts have been regularly performed. The issues raised are insufficient to record a satisfaction that the applicant is not guilty of the offence of which he is being prosecuted along with the other accused. At this stage, the Court is bound to accept the complaint and other documents including the panchanama at their face value and once so accepted it does not appear that there are no reasonable grounds for disbelieving that the accused is not guilty of the alleged offence. It is the reverse which appears to be true. Although the applicant is admitted to be the son of one of the ex-employees of the complainant's department, on behalf of the applicant, no grievance has been made as to why he should have been falsely implicated.

11. In the light of the above, I find that there is no merit in the bail application. The same is therefore hereby dismissed. Needless to observe the observations made herein are only for

the purpose of the disposal of the application and will not come in the way of the N.D.P.S. Court in deciding the case on its own merits.

12. Application dismissed.

N. A. BRITTO, J.

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